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81-2213

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al.*, *Appellants*,

v.

NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals Of The State Of North Carolina

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether North Carolina Public Records Law and Open Meeting Law, G.S. 132-1, 143-138.10 & 138.11, constitute a violation of a privacy right protected under the Constitution of the United States, and hence is invalid, inasmuch as they force the public disclosure of records of a non-stock, non-profit corporation organized under North Carolina law, and most specifically documents generated and discussions occurring in the course of litigation, covered at least in part by the attorney-client privilege, when, at the time each of the documents was generated, there was a reasonable expectation that these documents would remain private.

LIST OF PARTIES INVOLVED

Appellants include: Wake County Hospital System, Inc., Etta S. Creech, Marjorie B. Debnam, Curtis M. Thompson, Harvey L. Montague, J. T. Lindley, Odell C. Kimbrell, Jr., M.D., Rex G. Powel, M. Edmund Aycock, James Michael Weeks, and William F. Andrews, Sr.

Appellees include: News & Observer Publishing Company, a corporation, Frank A. Daniels, Jr., Claude Sitton, and Joye Brown.

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NEWS & OBSERVER PUBLISHING COMPANY, *et al.*, *Appellees*.

On Appeal From The Court Of Appeals
Of The State Of North Carolina

JURISDICTIONAL STATEMENT

Wake County Hospital System, Inc., et al., appeal from the final judgment of the North Carolina Court of Appeals decision which affirmed the judgment of a trial court compelling the appellants, a non-stock, non-profit corporation and officers and directors of that company to disclose certain documents, rejecting a claim that the disclosure of those documents, pursuant to applicable North Carolina statutes, was protected by a Federal Constitutional right of privacy and that the North Carolina statutes as so construed were repugnant to the Federal Constitution and hence invalid.

OPINIONS BELOW

The Judgment of the General Court of Justice, Superior Court Division, Wake County, North Carolina, filed January 7, 1981, is not reported. It is reprinted in the appendix hereto, App. 1a, infra.

The Opinion of the North Carolina Court of Appeals, filed December 1, 1981, is reported at 284 S.E.2d 542 and is reprinted at App. 6a, infra.

The North Carolina Supreme Court on March 3, 1982, denied a Petition for Discretionary Review without opinion. It is reprinted at App. 17a, infra.

JURISDICTION

The judgment of the North Carolina Court of Appeals, affirming a trial court judgment compelling Appellants to disclose certain documents, was entered on December 1, 1981 (App. 6a). A timely petition to the North Carolina Supreme Court for discretionary review was denied, without opinion, on March 3, 1982 (App. 17a).

A Notice of Appeal to this Court was duly filed in the North Carolina Court of Appeals on April 27, 1982 (App. 18a).

This appeal is being docketed in this court within 90 days from the denial of the petition for discretionary review below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

> Article VI and the First, Third, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution are set forth in full in the Appendix to this Jurisdictional Statement.

General Statutes of North Carolina:

> G.S. 132-1
>
> G.S. 143-318.1 & 318.2 (1971, c.638, s.1)
>
> G.S. 143-318.9 & 318.10 (1979, c.655, s.1)

G.S. 159-39(a)

are set forth in full in the Appendix to this Jurisdictional Statement.

STATEMENT OF THE CASE

This action was brought by the News and Observer Publishing Company, two of its officers, and one of its reporters (hereinafter usually collectively referred to as "The News") against the Wake County Hospital System, Inc., and its officers and directors (hereinafter usually collectively referred to as the "Hospital"), to force the Hospital to disclose to The News and to furnish to The News copies of certain documents concerning earlier litigation and certain financial reports and expense accounts. The facts of this dispute have been found by the courts below and are not in controversy.

The Hospital is a non-stock, non-profit corporation organized under North Carolina law. It was organized in 1965 by resolution of the Wake County Commissioners for the purpose of operating a hospital previously operated by the Wake County Hospital Authority. The County and the Hospital entered into an agreement under which the Hospital for $1.00 per year leased the hospital owned by the County for a renewable five-year term. In 1975 this lease was replaced by an operating agreement. Vacancies on the Hospital's board of directors are replaced subject to approval by the Board of County Commissioners and one County Commissioner serves *ex officio* on the Hospital Board. A separate agreement was entered into by which the County pays the Hospital for rendering care to the County's indigents. Upon dissolution or upon termination of the operating agreement, all assets of the Hospital are to be donated to the County to be used for the purposes for which the Hospital was formed. The County Board of Commissioners has the right to review and approve the Hospital's annual budget, to

have the Hospital records reviewed by an independent auditor, to furnish the County with copies of audited financial statements, to have a County representative attend Hospital meetings, review Hospital records, and make audits in connection with indigent records, to have the Hospital file with the County a schedule of charges and rates, to have the Hospital operated in accordance with standard practices for operating hospitals in North Carolina, and as provided in the operating agreement not to amend its articles of incorporation without prior County consent. Moreover, it was agreed that both the Hospital and the County understood that "none of the Trustees, officers, and employees of the [Hospital] is or shall be deemed to be an agent or employee of the County . . . ."

In December 1978, the Hospital was sued in three separate actions by three medical professional associations for alleged wrongful agreement to provide professional services. In August 1979, two of these actions were settled and dismissed before trial. The third suit was settled and dismissed in December 1979. A part of each settlement was an agreement that the terms of the settlement of each claim would not be released but would remain confidential.

The News sought access to inspect and to obtain copies of all records of the Hospital pertaining to those settlements. When the Hospital refused, The News brought this action claiming a right under the North Carolina Public Records Act, G.S. 132-1 to 132-9 to inspect and obtain copies of all documents of the Hospital pertaining to the settlements, including communications from counsel and minutes of meetings of the Hospital Board discussing the settlement including advice of counsel concerning these cases and proposals of settlement. Moreover, The News sought disclosure, and copies of, certain financial records including expense accounts for the preceding five years.

The suit was filed under the North Carolina Public Records Act, G.S. 132,[1] which provides for public access to any "public record" of any "public office, public officer or official . . . , institution, board, commission, bureau, council, department, authority or other unit of government of the State [of North Carolina] or of any county, unit, special district or other political subdivision of government." G.S. 132-1, 132-6. The Public Records Act specifically provides for public access to "written communications . . . made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action . . . ," except that such communications are subject to a three-year hiatus before becoming public records. G.S. 132-1.1.

The News moved for summary judgment. In opposition, the Hospital argued, *inter alia*, that the defendants in the action and the persons dealing with the Hospital[2] had a right of privacy in the confidential communications protected under the Federal Constitution and that the North Carolina statute construed to violate that right would render the statute invalid as repugnant

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[1] G.S. 132 is reproduced in full in the Appendix to this Jurisdictional Statement.

[2] The persons specifically mentioned were the three parties who had sued the Hospital and who had settled their cases with the Hospital, each with a specific agreement that the terms of the settlement would remain confidential and not be released. It should be noted that counsel for The News obtained and filed in the North Carolina Court of Appeals a Declaration from each of these parties stating that "he has no desire to become a party to the [present] action [then] on appeal to the North Carolina Court of Appeals . . . ." None of these Declarations purported to be a waiver of that party's right to privacy, a waiver of that party's contractual right as against the Hospital to have the terms of the settlement remain confidential, or any statement that the party had no objection to the information becoming public.

to the United States Constitution. The trial court granted the motion for summary judgment, holding that the documents sought were subject fully to disclosure under the North Carolina statute. The claim of the right of privacy under the United States Constitution was rejected without comment.

The Hospital and the other defendants filed a timely appeal to the North Carolina Court of Appeals, arguing, *inter alia*, that the order of the trial court violated "the reasonable expectations of privacy" of both the Hospital and the earlier litigants against the Hospital (Appellants' Brief to the N.C. Ct. of App., pp. 36-37) and the North Carolina statute as so construed and applied thus violates the right of privacy under the United States Constitution (e.g. *id.* at 33). On December 1, 1981, the North Carolina Court of Appeals affirmed the judgment of the trial court, rejecting the constitutional arguments with only the general comment that "we have carefully examined the [Hospital] System's remaining arguments and assignments of error and find each to be without merit." (App. 16a.)

A timely petition to the North Carolina Supreme Court for Discretionary Review was denied, without opinion, on March 3, 1982.

A Notice of Appeal to this Court was filed in the North Carolina Court of Appeals on April 27, 1982 (App. 18a).

REASONS THAT THIS CASE SHOULD BE DECIDED

The right to privacy under the Federal Constitution is now well recognized, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Stanley* v. *Georgia*, 394 U.S. 557 (1969); *Nixon* v. *Administration of General Services*, 433 U.S. 425 (1977). State statutes in contravention of that right cannot stand, for the privacy right is within the Fourteenth Amendment's concept of personal liberty. *Whalen* v. *Roe*, 429 U.S. 589, 598-99 (1977); *Griswold, supra*.

This case presents a claimed Federal Constitutional right to privacy in a context not before considered by this Court: where persons deal with a private, non-profit corporation later found to be a part of state government, and where in that connection they have generated documents with a reasonable expectation that those documents would remain private, only to have disclosure forced later by virtue of state statute. While this Court has not yet decided the issue of the right of privacy in this context, that general issue was presented in similar contexts previously to the courts of two states, Florida and California, and in each the Federal Constitutional right to privacy was held to supercede the state statute that would have forced disclosure. *City of Carmel-by-the-Sea* v. *Young*, 2 Cal. 3d 259, 85 Cal. Reptr. 1, 466 P.2d 225 (1970); *Byron, Harless, Schaffer, Reid & Assoc., Inc.* v. *State of Florida*, 360 So. 2d 83 (Fla. App. 1978). In the present case, the claimed federal right was rejected.

This Court has made it clear that an essential requisite of a Constitutional claim of disclosure privacy is that the claimant have a "legitimate expectation of privacy" in the particular information or communication in danger of disclosure by state action. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 458 (1977), citing *Katz* v. *United States*, 389 U.S. 347, 351-53 (1967). This "legitimate expectation of privacy" expresses the twofold requirement that, first, the claimant of the right of privacy exhibited an actual or subjective expectation that the information not be disclosed, and, second, the expectation is one that society recognizes as "legitimate" or reasonable. See *Katz*, 389 U.S. at 352. *Byron, Harless, Schaffer, Reid & Assoc., Inc.* v. *State of Florida*, 360 So. 2d 83, 94 (Fla. App. 1978).

The facts in this case show the existence of a "legitimate expectation of privacy." It was not until October 1, 1979, that North Carolina G.S. 143-318 was amended to apply to hospitals such as the Hospital in this action. Only then did G.S.

143-318.10 provide that the term "public body" shall include "the governing board of a 'public hospital' as defined in G.S. 159-39 . . . ." G.S. 159-39 states that the term "public hospital" include a "hospital that . . . (2) Is owned by a county . . . and operated by a non-profit corporation . . . a majority of whose board of directors or trustees are appointed by the governing body of a county . . . ."[3]

While it may be argued that the Hospital could have fallen within the Public Records Act before October 1, 1979, it is clear that North Carolina felt that it was necessary to enact legislation in 1979 to make the Hospital a "public body." It is also clear from the Judgment of the trial court in this case, App. 3a-4a, and from the opinion of the North Carolina Court of Appeals, App. 15a-16a, that both courts considered the 1979-enacted G.S. 143-318.10 and 318.11 significant to their conclusions, rejecting the argument that the disclosure statute "did not even apply to the Hospital as a "public body" during most of the "pertinent periods" involved in this case. (Appellant's Brief to Court of Appeals, p. 34.)

The facts are that the persons involved were dealing with what purported to be a private, non-profit corporation chartered, as are all corporations, by the state. Even the officers and directors of the Hospital could believe reasonably that they were associated with a private institution that was contracting with but not a part of the county government. The persons dealing with the Hospital could reasonably have had the same belief.[4]

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[3] While it may be argued, as it was in the state courts below, that the Hospital that is a party to this action is not within this definition, the finding by the courts below that the Hospital is a public body within the meaning of these interlocking statutes precludes that argument here.

[4] As noted previously (fn. 2, p. 5, supra) the three non-Hospital parties to the suits the confidential paper of which were ordered disclosed in this action have not waived their Constitutional rights of privacy. The Hospital, in possession of the documents sought, has standing to raise the privacy rights

Thus, when most of the documents ordered disclosed in this case were generated, there was a reasonable basis for an expectation by all involved that they were private documents that would remain private.

The suits the settlements papers of which the courts below ordered disclosed to the press were commenced eleven months *before* the enactment of G.S. 143-318.10 and 318.11, and in two of the three suits the entire settlement had been fully consummated before the amended statute took effect. The expense accounts ordered disclosed were to go back to 1975, more than four years before the amended statute took effect. [3]

That the parties intended that the papers involved be private is similarly clear. First, the settlement papers themselves state explicitly that the terms of settlement were to remain private and not to be released. But, even more fundamental, as the trial court recognized explicitly (App. 5a), at least some of the documents ordered disclosed come within the attorney-client privilege. Certainly, any person experienced enough to be an officer or director of a hospital must be expected to be aware of the attorney-client privilege and to expect that all matters falling within the privilege would remain private and confidential. And this Court has recently summarized the importance of the attorney-client privilege to our legal system. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). We respectfully submit that it is manifest that the attorney-client privilege is an area that falls within a "legitimate expectation of privacy." Yet, the courts below ordered the disclosure of such information, albeit with a three-year hiatus.

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of those absent parties, *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301 (1979), in addition to the privacy rights of the Hospital and its officers and directors.

[3] Indeed, even the audit report ordered disclosed on its face carries the date of September 30, 1979.

It is true that the courts below, applying the interlocking North Carolina statute, have found the Hospital to be a "public body" and as such subject to the Public Records Act. Once that finding is made, it is easy to say that one who is an officer or director of, or who deals with, the Hospital should know that all documents will be subject to public inspection and, indeed, reprinting in the newspapers. But the "legitimate expectation of privacy" should be looked at as of the time that the documents were generated. By all appearances at that time the Hospital was a private, non-profit corporation contracting with the County. G.S. 143-138.10 and 138-11, declaring such a hospital to be a "public body" subject to public disclosure, had not yet been enacted. A document generated at that time, particularly one that falls within the attorney-client privilege, we respectfully submit, is clearly made with a "legitimate expectation of privacy" within the meaning of this Court's decisions in *Griswold*, *Katz*, and *Nixon*.

We also submit that the issue presented is important enough to be decided. It needs no citation to recognize that state and local governments are growing in both relative size and relative importance. Public disclosure acts have also grown and are now quite the norm. These public disclosures acts come into conflict with reasonably anticipated federal rights of privacy of public officials, of persons who suddenly find themselves to be included in a broad sweep of public officials, and of those who deal with such officials. The *City of Carmel-by-the-Sea* and *Byron, Harless* cases from California and Florida earlier cited, *supra* p. 7, join this one as three examples of such conflicts.

It is important that the lines between legitimate public disclosure and legitimate privacy rights be clarified so that it is clearer when an expectation of privacy is legitimate under the Federal Constitution. We respectfully submit that this case, where the state of North Carolina (as construed by its courts)

legislated so as to permit public disclosure to a newspaper of what was reasonably expected to be private when made is an appropriate vehicle to begin this clarification.

CONCLUSION

For the foregoing reasons, we respectfully urge that this case be set down for plenary consideration by the Court. In the alternative, we urge that the Court reverse upon this Jurisdictional Statement and whatever opposing paper may be filed.

Respectfully submitted,

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June 1, 1982

APPENDIX

APPENDIX

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA

WAKE COUNTY

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,

Plaintiffs,

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS,

Defendants

JUDGMENT

Filed W.C.S. CT.
1981 Jan. 7: PM 12:25

THIS CAUSE coming on to be heard and being heard before the Honorable Thomas H. Lee, Judge Presiding at the Civil Session of the General Court of Justice, Superior Court Division, of Wake County, commencing on 24 November, 1980, the case having been regularly scheduled for hearing at that session, and being heard on 24 November 1980 on the plaintiffs' Motion for Summary Judgment, dated 3 October 1980, filed and served on the defendants on 6 October 1980 and the Court having considered the Motion for Summary Judgment and the pleadings, answers to interrogatories, and admissions on file, together with the affidavits and the certified copies of public records and documents listed in EXHIBIT A attached to and made a part of the plaintiffs' Motion for Summary Judgment and filed and served on the defendants on 6 October 1980, and the Court having considered the oral arguments of counsel for the parties and the memoranda of law and briefs filed by counsel for the respective parties, the Court

concludes that the pleadings, answers to interrogatories, and admissions on file, together with the affidavits and the plaintiffs' Exhibits, show that there is no genuine issue as to any material fact and that the plaintiffs are entitled to a judgment as a matter of law granting their Motion for Summary Judgment;

And upon the uncontradicted facts, the Court concludes that the defendant Wake County Hospital System, Inc., is "an agency of North Carolina government or its subdivisions" as defined by G.S. § 132.1, specifically, that the said defendant is a public officer and an agency of Wake County, and that the records of the defendant Wake County Hospital Systems, Inc., are public records as defined by G.S. § 132-1, subject to inspection, examination and copying by any person, including the plaintiffs herein, except such records of the defendant Wake County Hospital System, Inc., as are specifically exempt by statute from the application of G.S. § 132-1 and G.S. § 132-6; and the Court further concludes upon the uncontrolled facts that the following records of the defendant Wake County Hospital Systems, Inc., are public records within the meaning of G.S. § 132-1, and are records which the defendants, after demand by the plaintiffs for inspection and copying, have refused to permit the plaintiffs to inspect and examine and to have copies:

(a) All minutes of every meeting and session of the Board of Directors of the defendant Wake County Hospital Systems, Inc., and of every Committee of the Board of Directors, at which there were deliberations or voting or other actions with respect to the settlement of the claims and litigation involved in civil actions in the General Court of Justice, Superior Court Division, Wake County, North Carolina, entitled as follows: (a) David Lane Jones, M.D., P.A., v. Wake County Hospital System, Inc. (78 CVS 6524); (b) Morton L. Meltzer, M.D., P.A., v. Wake County Hospital System, Inc. (78 CVS 6525); and (c) Cary Family Medicine and Ambulatory Care Center, P.A., v. Wake County Hospital System, Inc. (78 CVS 6526), EXCEPTING, HOWEVER, any portion of any such minutes which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1, which communication shall not be subject to public inspection until three years from the date such communication was received by the Board of Directors of the defendant Wake County Hospital System, Inc.

(b) Every written instrument or document in the form of a release or other written agreement signed by each of the claimants [the plaintiffs in the civil actions referred to in paragraph (a)] effectuating or otherwise evidencing the settlement of each of the claims and the litigation involving the claims, respectively.

(c) Every check or voucher issued and payable to each of the claimants referred to in paragraph (a) in payment of the amount agreed upon in settlement of each of the respective claims.

(d) Every record reflecting all of the expense accounts submitted by the defendant William F. Andrews and the members of the Board of Directors of the defendant Wake County Hospital System, Inc., over the past five years which were paid by the said defendant.

And it appears to the Court from the answers of the corporate defendant to plaintiffs' Interrogatory No. 1 that on December 27, 1979, the Board of Directors of Wake County Hospital System, Inc., by action of the said Board of Directors taken during an executive session, authorized the settlement of the claim of Morton Meltzer, M.D., P.A., and it appears that in paragraph 23 of the Answer the defendants made the following admissions: "It is admitted that the Board of Directors of the Wake County Hospital System, Inc. considered and approved the settlement of the claim of Morton Meltzer, M.D., P.A. authorizing the payment of monies to Morton Meltzer, M.D., P.A. and gave instructions to its attorney concerning the settlement and that the terms of the settlement have not been reported to the Minutes of the regular meetings of the Board of Directors." The Court concludes that the defendants, members of the Board of Directors of Wake County Hospital System, Inc., have failed to comply with the mandate of G.S. § 143-318.11(a)(4), last sentence, reading as follows (effective 1 October 1979): "If a public body has considered a settlement in executive session, the terms of that settlement shall be reported to the public body and entered into its minutes within a reasonable time after the settlement is concluded."

It appears to the Court that the defendants made the following further admission in paragraph 28 of the Answer: "It is admitted that from December 19, 1978, to December 31, 1979, the Board of Directors of the Wake County Hospital System, Inc., pursuant to its

established schedule of meetings, held regular meetings and executive sessions at which time its attorney reported on three (3) complaints above referred to, and authorized the settlement of such claims." G.S. § 143-318.11(d) provides as follows: "(d) Minutes of executive session. Nonwithstanding the provisions of G.S. 132-6, minutes and other records made of an executive session may be withheld from public inspection so long as public inspection would frustrate the purpose of the executive session." The Court concludes that there is no showing or evidence in the record that public inspection at the present time of minutes of executive sessions of the Board of Directors of Wake County Hospital System, Inc., held prior to December 31, 1979, at which the Board authorized settlement of the said three claims would frustrate the purpose of any such executive session.

The Court concludes as a matter of law that the plaintiffs are entitled to inspect, examine and have copies of the records hereinbefore specified, as provided by G.S. § 132-6, except as to written confidential communications of counsel for the corporate defendant as hereinbefore specified, and upon the undisputed and uncontradicted facts and the said conclusions of law, it appears to the Court that the plaintiffs are entitled to Summary Judgment against the defendants compelling the defendants to permit the plaintiffs to inspect, examine and have copies of the said records, and against the defendants who are members of the Board of Directors of the defendant Wake County Hospital System, Inc., directing and compelling them to report and enter into the minutes of the said Board the terms of the settlement of the claim of Morton Meltzer, M.D., P.A., which was authorized at the executive session held on December 27, 1979; and counsel for the parties hereto having executed and filed herein a written stipulation that the Court may sign and enter a judgment or order in this case out of the session and out of the District; now, therefore,

IT IS ORDERED AND ADJUDGED, as follows:

1. That the defendants, Marjorie B. Debnam, Curtis M. Thompson, Harvey L. Montague, J. T. Lindley, Odell C. Kimbrell, Jr., Rex C. Powell, M. Edmund Aycock and James Michael Weeks, the members of the Board of Directors of the defendant Wake County

Hospital System, Inc., be and they are hereby ordered, directed and commanded to comply with the provisions of G.S. § 143-318.11(a)(4), last sentence, by reporting and entering into the minutes of the said Board the terms of the settlement of the claim of Morton Meltzer, M.D., P.A., authorized by the said Board at an executive session held on December 27, 1979.

2. That the defendant Wake County Hospital System, Inc., and its officers and directors, defendants herein, including the defendant Marjorie B. Debnam, Secretary and custodian of the minutes and records of the Board of Directors of the defendant Wake County Hospital System, Inc., and the defendant Etta S. Creech, Secretary and custodian of the records of the defendant Wake County Hospital System, Inc., be and they are ordered, directed and commanded to permit the plaintiffs to inspect, examine and have copies of the specific records of the defendant Wake County Hospital System, Inc., hereinbefore described, in accordance with the provisions of G.S. § 132-6, specifically excepting, however, any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1, and excepting also any portion of any minutes of the Board of Directors of the defendant Wake County Hospital System, Inc., which may contain any written confidential communication of counsel for the defendant Wake County Hospital System, Inc., as defined by G.S. § 132-1.1; and it is ordered that any such communication shall not be subject to public inspection until three years from the date such communication was received the Board of Directors of the defendant Wake County Hospital System, Inc.

3. That the costs of this action be taxed against the defendants.

This 6th day of January 1981.

/s/ THOMAS H. LEE
Thomas H. Lee, Judge Presiding

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., M.D., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS, SR.

No. 8110SC274.

Court Of Appeals Of North Carolina.
Dec. 1, 1981.

HILL, Judge.

On May 25, 1955, the Wake County Board of Commissioners [hereinafter referred to as the Commissioners] followed the recommendation of a "hospital survey" ordered by them in 1954 and created the Wake County Hospital Authority [hereinafter referred to as the Authority]. One county commissioner and six other citizens were named to the board of trustees of the Authority. By resolution on 18 July 1955, the Commissioners vested in the Authority "duties and powers for the planning, establishment, construction, maintenance and operation of a county hospital. . . ." The Commissioners further resolved that they would have the power to remove any member of the Authority for misconduct "or for other causes which in the sound discretion of the board renders such member as unfit or disqualified to serve." Also, the county treasurer would have custody of "all funds of the hospital . . . and establish and maintain an accounting system in such manner as to give a true and accurate accounting of all the financial transactions of the hospital and clinics." The Authority, however, would retain control over the expenditures of moneys collected through the operation of its hospitals and clinics. In addition, the Authority would have the power to adopt its own by-laws and to select and hire all necessary employees and assistants. Signifi-

cantly, the resolution states that "[t]he Hospital shall be operated at all times, and in every respect administered as a charitable, non-profit hospital; no part of the net earnings of the Hospital shall ever inure to the benefit of any individual, firm, corporation or private shareholder." Further, title to all property for hospital purposes would be vested in the County, although the Authority could purchase necessary equipment. The Commissioners also placed certain fiscal limitations upon the Authority: (1) that the Commissioners review and approve the annual budget of the Authority; (2) that the Authority not borrow money, undertake additional programs, or other expenditures without the approval of the Commissioners; and (3) that a representative of the Commissioners be permitted to attend meetings, review the Authority's records, and make audits necessary in connection with indigent's records..

On 7 June 1965, the Commissioners unanimously approved a resolution adopted by the Authority "to convert Wake Memorial Hospital to a non profit corporation." Three months later the Commissioners officially approved the articles of incorporation of the System, a lease agreement between the county and the System, and an agreement between the county and the System for the care and treatment of indigent patients.

The System's articles of incorporation, filed 9 September 1965, provide, as did the Commissioner's resolutions creating the Authority, that "[t]he corporation shall not have and issue capital stock and shall be operated without profit to the members or their successors, and no part of the net earnings shall inure, or may lawfully inure, to the benefit of any member of individual." Further, in the event of dissolution of the corporation, "all of its moneys, properties, and other assets" would be donated, transferred and delivered to the county to be used by the county "exclusively for the accomplishments of the purposes for which the corporation is formed." The articles of incorporation also provide that all vacancies in the membership of the System's board of directors would be "subject to the approval of the Board of County Commissioners of Wake County. . . ."

The lease agreement entered into by the county and the System on 7 September 1965 provided for a renewable five-year term; the annual

rental was $1.00 per year during the term. The county also placed certain fiscal limitations upon the System very similar to limitations placed upon the Authority by the Commissioners: (1) that the Commissioners review and approve the annual budget of the System; (2) that the System make its records available to an independent auditor mutually satisfactory to the county and the System; (3) that a representative of the county be permitted to attend meetings, review the System's records, and make audits necessary in connection with indigents' records; (4) that the System file with the county a schedule of its charges and rates; and (5) that the System operate its facilities in accordance with standard practices for operating hospitals in North Carolina. The System was operated under this lease agreement until 1 January 1975.

On 1 January 1975, the System became subject to an operating agreement entered into by it and the county. Included in the agreement was a bond order authorizing the issuance of $34,775,000 in revenue bonds which were identified as "Bonds of the County." Pursuant to the bond order, the System agreed to collect revenues for deposit to the revenue fund which "constitute[s] revenues of the County derived from the ownership of the System by the County. . . ." The System further agreed to make its records available to the county and furnish it copies of audited financial statements and additional audits and reports as required by law. Upon the termination of this agreement, in accordance with the amended articles of incorporation, the System agreed to "transfer, assign and convey to the County, without any consideration therefor, and and all moneys, properties and other assets" of the System except as otherwise required by law. The System also agreed that it would not change its corporate existence, nor further amend its articles of incorporation, "without the prior written consent of the County." Finally, the System and the county "understood and agreed that the [System] is an independent contractor and that none of the Trustees, officers, employees or agents of the [System] is or shall be deemed to be an agent or employee of the County by reason of anything contained in this Agreement."

After two and one-half years of operation under the 1975 agreement, the county and the System entered into a new operating agree-

ment on 1 June 1977. Included in this agreement was another bond order of $41,535,000 adopted by the Commissioners to refund the 1975 revenue bonds. The significant provisions of this operating agreement and the 1975 agreement are substantially the same. At all times it has been the purpose of the System "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County through the continued assistance of contributions by the County."

On 19 December 1978, three separate civil actions were begun against the System by three medical professional associations — David Lane Jones, M.D., P.A.; Morton Meltzer, M.D., P.A.; and Cary Family Medicine and Ambulatory Care Center, P.A. — for alleged wrongful termination of agreements to provide professional services to the System by each plaintiff. Each of the civil actions subsequently was dismissed, and the controversies were concluded by settlements. The newspaper was refused permission by the System to examine and copy its records pertaining to those settlements, and the crux of the case *sub judice* is whether those records and the expense account records later requested by the newspaper, are public records which must be disclosed under North Carolina's public records statutes. *See* G.S. 132-1 to -9.

[1] This case is before us on appeal from the trial judge's granting of summary judgment for the newspaper. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey* v. *Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980); *Singleton* v. *Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972). "Accordingly, the party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court and his entitlement to judgment as a matter of law." *Vassey* v. *Burch*, *supra* at 72, 269 S.E.2d at 140.

At the outset of this opinion, we find the facts as recounted above to be uncontroverted. The trial judge therefore was correct in concluding that there is no genuine issue as to any material fact in the case *sub judice*. Our review of the newspaper's summary judgment must focus upon the propriety of the trial judge's conclusions of law and whether they are supported by the facts.

G.S. 132-1 identifies for us which of the trial judge's legal conclusions are crucial to our review:

> "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, artifacts, or other documentary material, regardless of physical form or characteristics, *made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina goverment or its subdivisions*. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (Emphasis added.)

Under this statute, two questions must be answered: First, whether the trial judge was correct in concluding that the System is an "agency of North Carolina government or its subdivisions"; i.e., Wake County; and second, if the System is an agency, whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business. . . ."

[2] In deciding whether it is an agency of Wake County, the System urges us to consider, among other statutes, the Municipal Hospital Facilities Act, G.S. 131-126.18 to .30, and the Health Care Facilities Finance Act, F.S. 131A-1 to -25, *in pari materia* with the public records statutes. Those statutes show, the System argues, that the legislature did not intend it to be a "public agency or subdivision of the State."

It is established that "[u]nder the rules of statutory construction, statutes *in pari materia* must be read in context with each other." *Cedar Creek Enterprises, Inc.* v. *Department of Motor Vehicles*, 290

N.C. 450, 454, 226 S.E.2d 336, 338 (1976). *Accord, Newlin* v. *Gill*, 293 N.C. 348, 237 S.E.2d 819 (1977). "*In pari materia*" is defined as "[u]pon the same matter or subject." Black's Dictionary 898 (4th ed. 1968). It is abundantly clear that the statutes referred to above are not of the "same matter or subject" as the public records statutes. We therefore are obliged only to construe the phrase "agency of North Carolina government or its subdivisions" upon the plain meaning of G.S. 132-1 and in the context of the public records statutes.

There is no decisional law in North Carolina construing the agency requirement of the public records statutes. However, decisional law in the federal jurisdiction has established some guidelines for the meaning of the term "agency" in the Administrative Procedure Act [hereinafter referred to as the APA]. Under the APA, an agency "means each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . . " 5 U.S.C.A. § 551. The North Carolina statute's definition of the phrase "agency of North Carolina government or its subdivisions" is more specific than the APA definition:

> Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of goverment of the State or of any county, unit, special district or other political subdivision of government.

G.S. 132-1. In spite of this difference in definitions, we find the federal decisional law under the APA instructive in this case.

Soucie v. *David*, 448 F.2d 1067 (D.C.Cir. 1971), is a leading case in construing the term "agency" in the APA for application to the Freedom of Information Act. The court declared that "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." *Id.* at 1073. Administrative entities that neither perform rule-making nor ajudicative duties also may be agencies. *Id. Accord, Koden* v. *Department of Justice*, 564 F.2d 228 (7th Cir. 1977). "The important consideration is whether [the administrative entity] has any authority in law to make decisions." *Washington Research Project, Inc.* v. *Department of Health, Education & Welfare*, 504 F.2d 238,

248 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1951, 44 L.Ed.2d 450 (1975).

One commentator has suggested that the legislative history of the APA reflects "a desire to use the term 'agency' to identify centers of gravity lies, where substantial 'powers to act' with respect to individuals are vested, there is an administrative agency for purposes of the APA." J. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U.Pa.L.Rev. 1, 9 (1970) [hereinafter referred to as Freedman].

The documents creating the System support our conclusion that it is a separate administrative entity which has the power to govern its daily functions with certain supervision and control by the county. Since the System clearly has "independent authority" in the function of its task "to provide for the care and maintenance of the indigent sick and afflicted poor of Wake County," the System falls within the guidelines of the federal jurisdiction defining "agency" in the APA. The critical determination is, however, whether this "independent authority" so overshadows the county's supervisory responsibilities that it forecloses a conclusion that the System is an "agency *of North Carolina government or its subdivisions;*" i.e., Wake County. We hold that it does not, and find that the System is an agency of the county under the North Carolina public records statutes.

[3] The System argues that its status as a "private, non-profit corporation" and "independent contractor" is exclusive of the status of agency under the public records statutes. However, several courts have found corporate entities to be agencies of local government for a variety of purposes. Most notably, in *Coats* v. *Sampson County Memorial Hospital, Inc.*, N.C. 332, 141 S.E.2d 490 (1965), our Supreme Court found a hospital organized as a non-stock, nonprofit corporation to be an agency of Sampson County for venue purposes. The hospital was governed by a board of trustees appointed by the Sampson County Board of Commissioners, it occupied premises owned and provided by the county under a lease, and in the event of dissolution, the hospital was obligated to transfer its assets to the county. *Id.* Justice Sharp, later Chief Justice wrote for the Court:

> Admittedly defendant is not a municipality in the sense of a political subdivision such as a city or a town or a quasi-

> municipality like a county. (Citation omitted.) G.S. 131-126.28 does, however, declare the establishment, construction, maintenance and operation of hospital facilities to be public and governmental functions; and, under the provisions of G.S. 131-126.20 and G.S. 131-126.21(a), Sampson County has delegated to defendant its authority to exercise these functions. Defendant is, therefore, an agency of Sampson County . . . .

Id. at 334, 141 S.E.2d at 492.

In *Sides* v. *Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 18, 213 S.E.2d 297, 300 (1975), a hospital was created by legislative act as a "body corporate." The Court noted that the act granted "the county the authority to levy a special tax to provide for the operation and maintenance of the hospital and to substantially control its operations through the county board of commissioners . . . ." *Id.* Based upon examination of the legislative acts of creation and relevant administrative rulings, the Court found the hospital to be an agency of Cabarrus County, maintained thereby as a "proprietary function," and therefore liable in tort for the negligent acts of its employees committed in the scope of their employment. *Id.*

Similarly, a board of trustees of a public library, organized as " 'a separate corporate entity' by the Act under which it came into being," was found to be an agency of the City of Newark, New Jersey, and thereby subject to laws affecting contracts with municipalities. *Glick* v. *Trustees of Free Public Library*, 2 N.J. 579, 582, 67 A.2d 463, 464 (1949). The court examined the relationship between the library and the municipality and concluded that "[the Trustees'] incorporation as a body politic . . . in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design." *Id.* at 583-84, 67 A.2d at 465.

In *Moberly* v. *Herboldsheimer*, 276 Md. 211, 345 A.2d 855 (1975), a hospital with corporate status was found to be an agency of the City of Cumberland, Maryland, and thereby subject to that state's public information law. Among other things, "[a] survey of the enactments relative to the Hospital, including, specifically, the statements relative to the relationship of the Hospital to the City of Cumberland . . . leads to the conclusion that the Hospital is in fact an

agency of the City of Cumberland." *Id.* at 225, 375 A.2d at 862-63. Likewise, the District Court of Appeal of Florida found "a nonprofit corporation composed of public spirited citizens" to be an agency within the purview of that state's public records law. *Schwartzman* v. *Merritt Island Volunteer Fire Dept.*, 352 S.2d 1230, 1231 (Fla.App. 1977).

Although these cases illustrate that a corporate entity also may be considered an agency of local government, even for the purposes of state public records statutes, they are not entirely dispositive of the case *sub judice*. "The unavoidable fact is that each new arrangement must be examined anew and in its own context." *Washington Research Poject, Inc.* v. *Department of Health, Education & Welfare, supra* at 246. *See also Public Citizen Health Research Group* v. *Department of Health, Education & Welfare*, 449 F.Supp. 937 (D.C.1978). As did the courts in the above cases, we now must look at the nature of the relationship between the System and the county to determine that the System is an "agency of North Carolina government or its subdivisions."

Wake County's supervisory responsibilities and control over the System are manifest. The System's articles of incorporation provide (1) that upon its dissolution, the System would transfer its assets to the county; and (2) that all vacancies on the board of directors would be subject to the Commissioners' approval. The lease agreement provided (3) that the System occupy premises owned by the county under a lease for $1.00 a year; (4) that the Commissioners review and approve the System's annual budget; (5) that the county conduct a supervisory audit of the System's books; and (6) that the System report its charges and rates to the county. The operating agreements also provide (7) that the System be financed by county bond orders; (8) that revenue collected pursuant to the bond orders be revenue of the county; and (9) that the System would not change its corporate existence nor amend its articles of incorporation without the county's written consent.

The Municipal Hospital Facilities Act also sheds light upon the nature of the System's relationship to the county in congruence with the articles of incorporation, lease, and operating agreements which

we have reviewed. G.S. 131-126.28, for example, states that the operation of a county hospital is a "public and governmental" function, "exercised for a public purpose," and thereby a county function. *See Coats* v. *Sampson County Memorial Hospital, Inc., supra.*

We note that this relationship between the System and the county was not a radical change from the relationship between the Authority and the county. Most significantly, the entity created by resolution in 1955, "a charitable, non-profit hospital," remained as such under the System's articles of incorporation. The county further retained its ownership and fiscal controls upon the System in a manner virtually identical to those upon the Authority. In short, the relationship has undergone little more than a change of name through incorporation. "[T]he title of the authority in question, whether it be 'agency' or 'board' or 'bureau' or 'office' or 'department,' is irrelevant to assessing the power it exerts." Freedman, 119 U.Pa.L.Rev. at 9.

The System has conceded on oral argument that, as the Authority, it was an agency of Wake County. The history of the System's existence since its incorporation mandates the same concession. These ties to the county lead us to the inescapable conclusion that the System exercises its "independent authority" so intertwined with the county that it must be, and is, an "agency of North Carolina government or its subdivisions;" i.e., Wake County.

Since the System is an agency of Wake County under our public records statutes, we now must determine whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business . . . ." G.S. 132-1. The newspaper seeks inspection and examination of two types of records: first, records reflecting the terms of settlements reached in three actions against the System by medical professional associations; and second, expense account records submitted by the System's president and board of directors.

[4, 5] G.S. 143-318.11(a)(4) requires a "public body" to report its consideration of settlement terms in executive session by entering the terms "into its minutes within a reasonable time after the settlement is concluded." By virtue of the definitions in G.S. 143-318.10(b) and G.S. 159-39(a), we find that the System is a "public

body" that must, by law, record settlement terms considered in executive sessions. In addition, the public has the right to know the terms of settlements made by the System in actions for wrongful terminations of its agreements since the funds from which the settlements were paid must be considered the county's funds. *See Miami Herald Publishing Co.* v. *Collazo*, 329 S.2d 333 (fla. App.1976); *Courier Journal* v. *McDonald*, 524 S.W.2d 633 (Ky.App.1974). Therefore, we conclude that the documents connected with the settlement terms in the case *sub judice* are "public records" which were "made . . . pursuant to law . . . in connection with the transaction of public business . . . ."

[6] We reach the same conclusion regarding the expense accounts submitted by the System's president and board of directors. The phrase in G.S. 132.1, "pursuant to law or ordinance in connection with the transaction of public business," should include, in addition to those records required by law, those records that are kept in carrying out lawful duties. *See* Comment, *Administrative Law — Public Access to Government-Held Records: A Neglected Right in North Carolina*, 55 N.C.L.Rev. 1187 (1977); J. Johnson & D. Lawrence, *Interpreting North Carolina's Public Records Law*, 10 Local Gov't.L.Bull. 1 (Inst. of Gov't., Chapel Hill, N.C., 1977). The statute therefore includes the expense account records submitted by the System's president and board of directors while carrying out their lawful duties. Those records, then, also are "public records" under G.S. 132-1.

We conclude that the trial judge's conclusions of law are supported by the facts as found. Thus, the summary judgment for the newspaper was not improvidently granted.

We have carefully examined the System's remaining arguments and assignments of error and find each to be without merit. For all of the reasons discussed above, the summary judgment for the newspaper is

Affirmed.

VAUGHN and WHICHARD, JJ., concur.

SUPREME COURT OF NORTH CAROLINA
TENTH DISTRICT
Fall Term 1981

No. 8110SC274

NEWS & OBSERVER PUBLISHING COMPANY, *et al*

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., *et al*

ORDER DENYING PETITION FOR DISCRETIONARY REVIEW

Upon consideration of the petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 3rd day of March 1982.

/s/ MITCHELL, J.
Mitchell, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of March 1982.

/s/ J. GREGORY WALLACE
J. Gregory Wallace
Clerk of the Supreme Court

IN THE COURT OF APPEALS OF THE STATE OF NORTH CAROLINA
TENTH DISTRICT

COURT OF APPEALS	SUPERIOR COURT
No. 811OSC274	**No. 80CvS1640**

THE NEWS AND OBSERVER PUBLISHING COMPANY, a Corporation, FRANK A. DANIELS, JR., CLAUDE SITTON, and JOYE BROWN,
Appellees.

v.

WAKE COUNTY HOSPITAL SYSTEM, INC., ETTA S. CREECH, MARJORIE B. DEBNAM, CURTIS M. THOMPSON, HARVEY L. MONTAGUE, J. T. LINDLEY, ODELL C. KIMBRELL, JR., REX G. POWELL, M. EDMUND AYCOCK, JAMES MICHAEL WEEKS, and WILLIAM F. ANDREWS, SR.,
Appellants,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wake County Hospital System, Inc., et al., appeals to the Supreme Court of the United States from the December 1, 1981 judgment of the Court of Appeals of the State of North Carolina affirming the Superior Court's decision No. 80CvS1640. The Supreme Court of North Carolina, on March 5, 1982, denied a timely-filed petition to review the judgment of the North Carolina Court of Appeals.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

This the 27th day of April, 1982.

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UNITED STATES CONSTITUTION

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT III [1791].

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791].

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual sevice in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791].

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT IX [1791].

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for

President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection of rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

NORTH CAROLINA GENERAL STATUTES

Chapter 132.
Public Records

§ 132-1. "Public records" defined.

"Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government. (1935, c. 265, s. 1; 1975, c. 787, s. 1.)

§ 132-1.1 Confidential communications by legal counsel to public board or agency; not public records.

Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three

years from the date such communication was received by such public board, council, commission or other governmental body. (1975, c. 662.)

§ 132-2. Custodian designated.

The public official in charge of an office having public records shall be the custodian thereof. (1935, c. 265, s. 2.)

§ 132-3. Destruction of records regulated.

No public official may destroy, sell, loan, or otherwise dispose of any public record, except in accordance with G.S. 121-5, without the consent of the Department of Cultural Resources. Whoever unlawfully removes a public record from the office where it is usually kept, or alters, defaces, mutilates or destroys it shall be guilty of a misdemeanor and upon conviction fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00). (1935,, c. 265, s. 3; 1943, c. 237; 1953, c. 675, s. 17; 1957, c. 330, s. 2; 1973, c. 476, s. 48.)

§ 132-4. Disposition of records at end of official's term.

Whoever has the custody of any public records shall, at the expiration of his term of office, deliver to his successor, or, if there be none, to the Department of Cultural Resources, all records, books, writings, letters and documents kept or received by him in the transaction of his official business; and any such person who shall refuse or neglect for the space of 10 days after request made in writing by any citizen of the State to deliver as herein required such public records to the person authorized to receive them shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. (1935, c. 265, s. 4; 1943, c. 237; 1973, c. 476, s. 48; 1975, c.. 696, s. 1.)

§ 132-5. Demanding custody.

Whoever is entitled to the custody of public records shall demand them from any person having illegal possession of them, who shall

forthwith deliver the same to him. If the person who unlawfully possesses public records shall without just cause refuse or neglect for 10 days after a request made in writing by any citizen of the State to deliver such records to their lawful custodian, he shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. (1935, c. 265, s. 5; 1975, c. 696, s. 2.)

§ 132-5.1. Regaining custody; civil remedies.

(a) The Secretary of the Department of Cultural Resources or his designated representative or any public official who is the custodian of public records which are in the possession of a person or agency not authorized by the custodian or by law to possess such public records may petition the superior court in the county in which the person holding such records resides or in which the materials in issue, or any part thereof, are located for the return of such public records. The court may order such public records to be delivered to the petitioner upon finding that the materials in issue are public records and that such public records are in the possession of a person not authorized by the custodian of the public records or by law to possess such public records. If the order of delivery does not receive compliance, the petitioner may request that the court enforce such order through its contempt power and procedures.

(b) At any time after the filing of the petition set out in subsection (a) or contemporaneous with such filing, the public official seeking the return of the public records may by ex parte petition request the judge or the court in which the action was filed to grant one of the following provisional remedies:

(1) An order directed at the sheriff commanding him to seize the materials which are the subject of the action and deliver the same to the court under the circumstances hereinafter set forth; or

(2) A preliminary injunction preventing the sale, removal, disposal or destruction of or damage to such public records pending a final judgment by the court.

(c) The judge or court aforesaid shall issue an order of seizure or grant a preliminary injunction upon receipt of an affidavit from the

petitioner which alleges that the materials at issue are public records and that unless one of said provisional remedies is granted, there is a danger that such materials shall be sold, secreted, removed out of the State or otherwise disposed of so as not to be forthcoming to answer the final judgment of the court respecting the same; or that such property may be destroyed or materially damaged or injured if not seized or if injunctive relieve is not granted.

(d) The aforementioned order of seizure or preliminary injunction shall issue without notice to the respondent and without the posting of any bond or other security by the petitioner. (1975, c. 787, s. 2.)

§ 132-6. Inspection and examination of records.

Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law. (1935, c. 265, s. 6.)

§ 132-7. Keeping records in safe places; copying or repairing; certified copies.

Insofar as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used. Record books should be copied or repaired, renovated or rebound if worn, mutilated, damaged or difficult to read. Whenever any State, county, or municipal records are in need of repair, restoration, or rebinding, the head of such State agency, department, board, or commission, the board of county commissioners of such county, or the governing body of such municipality may authorize that the records in need of repair, restoration, or rebinding be removed from the building or office in which such records are ordinarily kept, for the length of time required to repair, restore, or rebind them. Any public official who causes a record book to be copied shall attest it and shall certify on oath that it is an accurate copy of the original book. The copy shall then have the force of the original. (1935, c. 265, s. 7; 1951, c. 294.)

§ 132-8. Assistance by and to Department of Cultural Resources.

The Department of Cultural Resources shall have the right to examine into the condition of public records and shall give advice and assistance to public officials in the solution of their problems of preserving, filing and making available the public records in their custody. When requested by the Department of Cultural Resources, public officials shall assist the Department in the preparation of an inclusive inventory of records in their custody, to which shall be attached a schedule, approved by the head of the governmental unit or agency having custody of the records and the Secretary of Cultural Resources, establishing a time period for the retention or disposal of each series of records. Upon the completion of the inventory and schedule, the Department of Cultural Resources shall (subject to the availability of necessary space, staff, and other facilities for such purposes) make available space in its Records Center for the filing of semicurrent records so scheduled and in its archives for noncurent records of permanent value, and shall ender such other asistance as needed, including the microfilming of records so scheduled. (1935, c. 265, s. 8; 1943, c. 237; 1959, c. 68, s. 2; 1973, c. 476, s. 48.)

§ 132-8.1. Records management program administered by Department of Cultural Resources; establishment of standards, procedures, etc.; surveys.

A records management program for the application of efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposal of official records shall be administered by the Department of Cultural Resources. It shall be the duty of that Department, in cooperation with and with the approval of the Department of Administration, to establish standards, procedures, and techniques for effective management of public records, to make continuing surveys of paper work operations, and to recommend improvements in current records management practices including the use of space, equipment, and supplies employed in creating, maintaining, and servicing records. It shall be the duty of the head of each State agency and the governing body of each county, municipality and other subdivision of government to cooperate with the Department of Cultural Resources in conducting surveys and to establish

and maintain an active, continuing program for the economical and efficient management of the records of said agency, county, municipality, or other subdivision of government. (1961, c. 1041; 1973, c. 476, s. 48.)

§ 132-8.2. Selection and preservation of records considered essential; making or designation of preservation duplicates; force and effect of duplicates or copies thereof.

In cooperation with the head of each State agency and the governing body of each county, municipality, and other subdivision of government, the Department of Cultural Resources shall establish and maintain a program for the selection and preservation of public records considered essential to the operation of government and to the protection of the rights and interests of persons, and, within the limitations of funds available for the purpose, shall make or cause to be made preservation duplicates or designate as preservation duplicates existing copies of such essential public records. Preservation duplicates shall be durable, accurate, complete and clear, and such duplicates made by a photographic, photostatic, microfilm, micro card, miniature photographic, or other process which accurately reproduces and forms a durable medium for so reproducing the original shall have the same force and effect for all purposes as the original record whether the original record is in existence or not. A transcript, exemplification, or certified copy of such preservation duplicate shall be deemed for all purposes to be a transcript, exemplification, or certified copy of the original record. Such preservation duplicates shall be preserved in the place and manner of safekeeping prescribed by the Department of Cultural Resources. (1961, c. 1041; c. 476, s. 48.)

§ 132-9. Access to records.

Any person who is denied access to public records for purposes of inspection, examination or copying may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders. (1935, c. 265, s. 9; 1975, c. 787, s. 3.)

ARTICLE 33B.

Meetings Of Governmental Bodies.

§ 143-318.1. Public policy. — Whereas the commissions, committees, boards, councils and other governing and governmental bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the peoples' business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly. (1971, c. 638, s. 1.)

§ 143-318.2. All official meetings open to the public. — All official meetings of the governing and governmental bodies of this State and its political subdivisions, including all State, county, city and municipal commissions, committees, boards, authorities, and councils and any subdivision, subcommittee, or other subsidiary or component part thereof which have or claim authority to conduct hearings, deliberate or act as bodies politic and in the public interest shall be open to the public. And every meeting, assembly, or gathering together at any time or place of a majority of the members of such governing or governmental body for the purpose of conducting hearings, participating in deliberations or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of said body shall constitute an official meeting, but any social meeting or other informal assembly or gathering together of the members of any such body shall not constitute an official meeting unless called or held to evade the spirit and purposes of this Article. (1971, c. 638, s. 1.)

ARTICLE 33C.

Meetings Of Public Bodies.

§ 143-318.9. Public policy. — Whereas the public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly. (1979, c. 655, s. 1.)

§ 143-318.10. All official meetings of public bodies open to the public. — (a) Except as provided in G.S. 143-318.11, G.S. 143-318.15, and G.S. 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, "public body" means any authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, or other political subdivisions or public corporations in the State that is composed of two or more members; and

(1) Exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function; and

(2) Is established by (i) the State Constitution, (ii) an act or resolution of the General Assembly, (iii) a resolution or order of a State agency, pursuant to a statutory procedure under which the agency establishes a political subdivision or public corporation, (iv) an ordinance, resolution, or other action of the governing board of one or more counties, cities, school administrative units, or other political subdivisions or public corporations, or (v) an executive order of the Governor or comparable formal action of the head of a principal State office or department, as defined in G.S. 143A-11 and G.S. 143B-6, or of a division thereof.

In addition, "public body" means (1) the governing board of a "public hospital" as defined in G.S. 159-39 and (2) each committee of a public body, except a committee of the governing board of a public hospital if the committee is not a policy-making body.

(c) "Public body" does not include and shall not be construed to include (1) meetings among the professional staff of a public body, unless the staff members have been appointed to and are meeting as an authority, board, commission, committee, council, or other body established by one of the methods listed in subsection (b)(2) of this section, or (2) meetings among the medical staff of a public hospital.

(d) "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the

members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article. (1979), c. 655, s. 1.)

§ 143-318.11. Executive sessions. — (a) Permitted purposes. A public body may hold an executive session and exclude the public:

(1) To consider the selection of a site or the acquisition by any means or lease as lessee of interests in real property. At the conclusion of all negotiations with regard to the acquisition or lease of real property, if final authorization to acquire or lease is to be given, it shall be given at any open meeting.

(2) To consider and authorize the acquisition by gift or bequest of personal property offered to the public or the governent of which it is a part.

(3) To consider and authorize the acquisition by any means of paintings, sculptures, objects of virtu, artifacts, manuscripts, books and papers, and similar articles and objects that are or will be part of the collections of a museum, library, or archive.

(4) To consider the validity, settlement, or other disposition of a claim against or on behalf of the public body or an officer or employee of the public body or in which the public body finds that it has a substantial interest; or the commencement, prosecution, defense, settlement, or litigation of a potential or pending judicial action or administrative proceeding in which the public body or an officer or employee of the public body is a party or in which the public body finds that it has a substantial interest. During such an executive session, the public body may give instructions of a claim, judicial action, or administrative proceeding. If a public body has considered a settlement in executive session, the terms of that settlement shall be reported to the public body and entered into its minutes within a reasonable time after the settlement is concluded.

(5) To consult with an attorney to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(6) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body.

(7) To consider matters dealing with specific patients (including but not limited to all aspects of admission, treatment, and discharge; all medical records, reports, and summaries; and all charges, accounts, and credit information pertaining to such a patient).

(8) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of a public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge of grievance by or against a public officer or employee. A public body may consider the appointment or removal of a member of another body in executive session but may not consider or fill a vacancy among its own membership except in an open meeting.

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Part 4. Public Hospitals.

§ 159-39. Special regulations pertaining to public hospitals. — (a) for the purposes of this Part, "public hospital" means any hospital that

(1) Is operated by a county, city, hospital district, or hospital authority, or

(2) Is owned by a county, city, hospital district or hospital authority and operated by a nonprofit corporation or association, a majority of whose board of directors or trustees are appointed by the governing body of a county, city, hospital district, or hospital authority, or

(3) On whose behalf a county or city has issued and has outstanding general obligation or revenue bonds, or to which a county or city makes current appropriations (other than appropriations for the cost of medical care to prisoners or indigents).

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